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No. 07-1546

In the Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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July 14, 2008

QUESTIONS PRESENTED

1. Whether the Court should grant review of petitioners' third petition in this case—which follows a court of appeals decision regarding post-judgment interest only—where, after extensive briefing by both the parties and the U.S. Solicitor General, the Court twice has already carefully considered and rejected certiorari review on the very same First Amendment, standing, FACE conspiracy, and RICO issues now raised again by petitioners for the third time.

2. Whether the Court should grant review of this factbound case where nothing has changed since petitioners' first petition challenging the *en banc* Ninth Circuit's application of settled law to the particular facts of this 13-year-old case, and where petitioners' arguments are also barred on preservation grounds.

RULE 29.6 STATEMENT

Planned Parenthood of the Columbia/Willamette, Inc. is a non-profit corporation. It does not have a parent corporation and no publicly-held company owns 10% of its stock.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This is now the third nearly identical petition for a writ of certiorari that ACLA has submitted in this case. As with its two prior petitions, the Court should deny review.

Five years ago, after the *en banc* court of appeals rendered the decision challenged by ACLA for the third time, the parties and the U.S. Solicitor General fully briefed the issues raised by ACLA, and this Court denied ACLA's petition. Two years later, after the court of appeals remitted the punitive-damages award, ACLA raised the very same arguments in its second petition, and this Court again denied review. Nothing has changed since those two denials, yet petitioners now seek review for a third time due solely to a court of appeals decision regarding post-judgment interest that is not even addressed in their third petition now before the Court. The Court should again deny review.

Indeed, ACLA's current petition is almost entirely a word-for-word copy of its two prior petitions—and, just like the prior petitions, it largely

boils down to a dispute about the application of the settled law of "true threats" under the First Amendment to the particular facts of this case. As the Solicitor General emphasized in opposing ACLA's first petition in 2003, "this Court does not sit to review the lower courts' application of correctly stated legal standards." (Resp. App. 47a.)[1] Nothing has changed since then. The law has not changed. No relevant circuit split has emerged. In fact, the only developments in this case have been the lower courts' rulings about post-judgment interest, rulings that ACLA does not challenge, or even mention, in its current petition. Once again, petitioners' disagreement with the factual result in this case simply is not a basis for Supreme Court review.

The other questions presented by ACLA's third petition—standing, FACE conspiracy, and RICO arguments—also fall well short of the standards required for the Court's review and are barred on preservation grounds. Indeed, just like the First Amendment questions, this Court has already twice declined to review these arguments—all of which were

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[1] Respondents—four physicians and two health clinics—are referred to collectively as "Physicians" and petitioners are referred to collectively as "ACLA." Citations to "Resp. App." are to respondents' appendix. Citations to the petition and appendix are denoted as "Pet." and "Pet. App."

raised on the first two petitions and none of which presents a developed legal question for Supreme Court review.

Accordingly, ACLA's petition for a writ of certiorari should once again be denied.

COUNTERSTATEMENT OF THE CASE

Because petitioners' statement of the facts is both inaccurate and incomplete, respondents summarize below the salient facts and procedural history of this case.[2]

A. Background Facts

In 1993, as anti-abortion violence was increasing, "wanted" posters targeting Dr. David Gunn, with his photograph, addresses and other personal information, were circulated where he lived and worked. On March 10, 1993, Dr. Gunn was murdered while entering an abortion clinic. Then, "wanted" posters of Dr. Wayne Patterson, another abortion provider, were circulated, with Dr. Patterson's personal identifying

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[2] These facts are set forth in the Ninth Circuit decisions (Pet. App. 1a-63a, 91a-228a), the district court's injunction (Pet. App. 262a-332a) (with record cites therein), the trial transcript ("Tr."), the trial exhibits ("Ex.") and other portions of the record in this case.

information. In August 1993, Dr. Patterson was murdered. Then, Paul Hill, closely-tied to petitioners, circulated "wanted" posters of Dr. John Britton, another abortion provider, containing his photograph, his home and office addresses, a physical description of him and his car, and accusing him of "crimes against humanity." On July 19, 1994, Hill murdered Dr. Britton and his volunteer escort, James Barrett, and wounded Mr. Barrett's wife, in their car outside the health clinic where Dr. Britton performed abortions. Petitioners applauded these actions. (Pet. App. 100a-102a, 270a-275a.)

Petitioners capitalized on the poster/murder pattern and the fear in its wake with their subsequent threats of bodily injury directed at Physicians. (Pet. App. 103a-105a.) In January 1995, having split from the mainstream anti-abortion movement because it refused to endorse violence (*Id.* at 101a-102a, 275a-276a), ACLA unveiled its "Deadly Dozen" hit list of thirteen physicians, including three respondents. (*Id.* at 102a, 263a-265a.) The Federal Bureau of Investigation and U.S. Marshals immediately contacted Physicians, who, with full knowledge of the prior poster/murder pattern and petitioners' "pro-force" position, purchased bulletproof vests, wigs and disguises. (*Id.* at 102a-106a, 149a, 263a-265a.)

ACLA's threats continued unabated. In August 1995, ACLA released a "wanted"-style poster of

respondent Dr. Robert Crist, with his photograph and home and work addresses, and visited Dr. Crist's office to relay the threat directly. Once again, petitioners succeeded in their intent to intimidate: Dr. Crist accepted law enforcement protection and undertook additional security measures to protect himself and his family. (Pet. App. 103a, 265a-266a.)

In January 1996, ACLA unveiled "the Nuremberg Files." (Pet. App. 103a-104a.) Petitioners surreptitiously sent the Nuremberg Files to Neal Horsley for placement on the internet in ACLA's name. Horsley complied, and the hardcopy files were destroyed. (*Id.* at 103a-104a, 266a-270a.) Amidst dripping blood, crossed-out names of murdered doctors and grayed names of wounded doctors, the Nuremberg Files contained Physicians' names, addresses and family information, and warned of a "payday someday, a day when what is sown is reaped." (*Id.* at 103a-104a, 135a-136a.)[3]

B. Trial, Jury Verdict and Injunction

Fearing for their lives and the safety of their families, respondents filed suit in October 1995,

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[3] Although Horsley is a non-party, it is undisputed that the Nuremberg Files were petitioners' creation. (Pet. App. 103a-104a, 266a-270a, 320a-325a.)

contending that petitioners' communications to Physicians were "threats of force" in violation of federal law.[4] Relying on settled threats law under multiple federal threats statutes (on which FACE was modeled), the district court denied ACLA's motions to dismiss and, after discovery, denied ACLA's motions for summary judgment. (Pet. App. 376a, 449a-450a.) After three weeks of trial, the jury found that each of the Deadly Dozen List, Crist Poster and Nuremberg Files constituted "a true threat by one or more of the defendants to bodily harm, assault or kill any one of the plaintiffs." (Pet. App. 482a-483a.) The jury then found—in response to a question in the jury verdict form proposed by ACLA—that each petitioner "violate[d] or conspire[d] to violate FACE" and that all but two petitioners also violated RICO. (Pet. App. 482a-500a; Resp. App. 62a-93a.) In doing so, the jury found that petitioners subjectively intended to intimidate under FACE. (Pet. App. 99a, 126a-127a, 137a.) Carefully assigning differing degrees of fault to each petitioner, the jury awarded Physicians compensatory damages under FACE and RICO and punitive damages under FACE. (*Id.* at 482a-500a.)

In enjoining petitioners from further unlawful conduct under 18 U.S.C. § 248(c)(1)(B), District Judge

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[4] Physicians sued under FACE, 18 U.S.C. § 248, and RICO, 18 U.S.C. §§ 1961-1968.

Robert E. Jones independently found both subjective and objective intent to threaten on behalf of each petitioner, finding:

> by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices or procedures.

(Pet. App. 105a-106a, 325a, 334a-335a.)

C. ACLA'S First Appeal

ACLA appealed, raising an amalgam of 35 constitutional, statutory, instructional, evidentiary and mistrial issues. A three-judge panel initially reversed on First Amendment grounds, and the Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judges Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners' conduct

was not protected speech, because the record showed, *inter alia*, that petitioners threatened violence with intention to intimidate. The *en banc* court affirmed the liability verdict, compensatory damages and injunction in their entirety, and remanded to the district court *solely* on the amount of the FACE punitive-damages award.

In her opinion for the *en banc* majority, Judge Rymer carefully surveyed the uniform body of threats law developed in the Ninth Circuit and the other Circuits following this Court's decision in *Watts* v. *United States*, 394 U.S. 705 (1969), and determined that the district court properly defined "threat" for purposes of this case. (Pet. App. 118a-136a.) The court of appeals also held that, under well-settled law, the jury properly considered context in determining that petitioners' statements were "true threats." (*Id.* at 132a-136a.) The court further found that, even were subjective intent required as a matter of constitutional law, the FACE instructions in this case required the jury to find that petitioners issued their threats with intent to intimidate respondents—that is, that they subjectively intended to cause respondents to fear bodily injury—thus rendering the constitutional

question unnecessary to the result in this case. (*Id.* at 99a, 126a-127a, 137a.)[5]

Although disagreeing with the result, the dissenting judges agreed that the *en banc* majority properly defined the legal standard for true threats, but simply disagreed with the application of the settled legal standard to the particular facts of this case. (*E.g.*, Pet. App. 156a-159a.)

D. ACLA's First Certiorari Petition

After its request for *en banc* rehearing by the full Ninth Circuit was denied, on October 8, 2002, ACLA filed a petition for a writ of certiorari with this Court, raising the very same First Amendment questions, as well as the same FACE conspiracy question, that are

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[5] The *en banc* court also considered and rejected the other arguments raised by ACLA on appeal. (Pet. App. 138a n.16, 140a n.17, 141a-146a.) In particular, the *en banc* court rejected ACLA's argument—now raised again in its third certiorari petition—that no claim for conspiracy to violate FACE exists. (*Id.* at 138 n.16) The court of appeals held that because ACLA raised this issue "for the first time on appeal," and that ACLA itself had proposed the disjunctive jury verdict question, it failed on preservation grounds. The *en banc* court also held that even if it were to consider this waived argument, it would not find in ACLA's favor because no "substantial injustice occurred." (*Id.*) *See infra* pp. 30-31.

presented again by the present petition.[6] Physicians opposed certiorari. On December 16, 2002, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States as to whether certiorari should be granted. After this Court issued its decision in *Virginia* v. *Black*, 538 U.S. 343 (2003), the Solicitor General, on May 30, 2003, filed his brief expressing the United States's view that the *en banc* Ninth Circuit "applied a legal standard for distinguishing 'true threats' from protected speech that is correct and consistent with this Court's decisions," including *Black*, and that for this and other reasons the petition should be denied. (Resp. App. 32a.) The Solicitor General's brief expressly recognized that, because the jury was required to—and did—find that each petitioner acted with subjective intent under the FACE statute, this case is "not a suitable vehicle" to address the question whether subjective intent is required for "true threats" under the First Amendment. (Resp. App. 40a.) ACLA and Physicians also filed supplemental briefs addressing the impact of *Black* on this case. On June 27, 2003, the Court denied review. (Pet. App. 90a.)

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[6] ACLA's *amici* on the first petition raised these First Amendment and FACE conspiracy questions, as well as the same standing and RICO questions raised again in ACLA's second and this third petition.

E. District Court Proceedings on Remand

On July 9, 2003, the Ninth Circuit issued its mandate on ACLA's first appeal, remanding solely for a review of the jury's punitive-damages awards. (Pet. App. 99a.) Despite the limitations of the remand, ACLA filed motions raising arguments wholly unrelated to punitive damages—all of which either had already been rejected or could have been raised long ago. (*Id.* at 66a-68a.) The district court thus "decline[d] to address the multitude of other issues" raised by ACLA. (*Id.*) Addressing the punitive-damages question properly before it, the district court concluded that the jury's awards were "reasonable and constitutional" under the Due Process Clause. (*Id.* at 68a.)

F. ACLA's Second Appeal

ACLA appealed. Again in contravention of the mandate, ACLA raised a multitude of issues on its second appeal unrelated to the punitive-damages issue that was the sole subject of the remand. ACLA's second appeal was heard by a three-judge panel comprised of Judges Fernandez, Rymer, and Kleinfeld. In an opinion by Judge Rymer, the three-judge panel unanimously held that the appeal was limited to punitive damages, as the *en banc* court had mandated, and remitted the punitive-damages awards dramatically. The court of

appeals held that although petitioners' conduct was "on the high side of reprehensibility" and "warrant[ed] the imposition of significant sanctions to punish and deter," the ratio of punitive to compensatory damages awarded by the jury exceeded constitutional limits. (Pet. App. 37a-38a.) Based on a single-digit ratio of 9:1, the court remitted the awards from over $100 million to a reduced amount totaling just $4.7 million and remanded "so that the district court may order a new trial unless [P]hysicians accept the remittitur." (*Id.* at 46a-50a.) The panel also unanimously affirmed the district court's disposition of the non-punitive-damages issues raised by ACLA—including the very same First Amendment, standing, FACE conspiracy, and RICO questions raised in the current petition—holding that "all these issues were finally settled" by the *en banc* court on the first appeal and "are not open for review." (*Id.* at 51a-53a.)

G. ACLA's Second Certiorari Petition

After its request for rehearing and rehearing *en banc* was denied (Pet. App. 451a-452a), ACLA, for the second time, sought review in this Court. In its February 21, 2006 petition for a writ of certiorari, ACLA raised the exact same three questions presented and made almost entirely the same arguments, word-for-word, that are raised again in its present, third petition. (*Compare* Pet. i, 1-25 *with* Petition for a Writ of Certiorari, 2006 WL 431977, at *i, *1-30 (Feb. 21,

2006).) On May 2, 2006, the Court denied ACLA's second petition for review. (Resp. App. 25a.)[7]

H. District Court Proceedings On Second Remand

On May 12, 2006, the Ninth Circuit issued its mandate on ACLA's second appeal. In accordance with this mandate, on June 7, 2006, Physicians filed with the district court their notice of acceptance of the remittitur of the punitive-damages award. (Pet. App. 4a.) On July 10, 2006, the district court entered a

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[7] ACLA contends that denial of its prior two petitions does not preclude review now "because the denial of certiorari is not an adjudication on the merits." (Pet. 9.) But this contention ignores the reality of what has occurred before this Court. At the time of ACLA's first petition, the parties, petitioners' *amici*, and the Solicitor General submitted briefs that addressed the very same First Amendment, standing, FACE conspiracy, and RICO questions that ACLA presents in its current petition, not jurisdictional or "finality" issues (which Physicians had noted only in a passing footnote in their first brief in opposition). It was only after this Court received the Solicitor General's detailed submission—"which concluded that none of ACLA's challenges . . . merited review" and which made no mention at all of any "finality" concerns—that ACLA's first petition was denied. Likewise, the briefing on ACLA's second petition focused exclusively on the substantive questions presented—which, as noted above, are precisely the same questions presented by ACLA on the current petition—and not on any issues of finality or this Court's jurisdiction.

corrected judgment containing the remitted punitive-damages award, with post-judgment interest under 28 U.S.C. § 1961 running from February 22, 1999. (*Id.* at 4a-5a; Resp. App. 3a-20a.)[8]

I. ACLA's Third Appeal

For the third time, ACLA appealed—and, once again, it refused to abide by the proper limits of its appeal. ACLA instead indicated its intent to reargue the issue of the plaintiff clinics' standing, an issue that had been addressed previously and was plainly precluded. On January 24, 2007, the Ninth Circuit—in a unanimous order issued by Judges Fernandez, Rymer, and Kleinfeld, the same three-judge panel that had decided ACLA's second appeal—limited the scope of ACLA's third appeal to the one, and only, issue to be resolved: "whether the district court erred in awarding post-judgment interest on the punitive-damages award from the date of the district court's original February 22, 1999 judgment." (Resp. App. 1a.) The Ninth Circuit made clear that "[a]ll other issues have been

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[8] Again going beyond the mandate, ACLA filed with the district court—but later withdrew—a motion for leave to file a motion arguing that the clinic plaintiffs lack standing. (Resp. App. 23a.) By Order dated June 22, 2006, the district court denied ACLA's motion: "[ACLA] challenged the standing of the Clinic plaintiffs on motions for summary judgment in 1998. . . . I will not reconsider that decision." (*Id.* at 23a-24a.)

decided" by its prior decisions and were not open for further review. (*Id.* at 1a-2a.)

On February 11, 2008, after briefing and argument, a three-judge panel comprised of Judges Leavy, Fisher, and Berzon unanimously held that post-judgment interest is mandatory under 28 U.S.C. § 1961 and that the law is settled that interest should run from the date of the initial judgment. (Pet. App. 7a, 14a-16a.) The court further held that although, under Federal Rule of Appellate Procedure 37(b), the court should have provided express instructions regarding post-judgment interest in its prior mandate, because the omission was "inadvertent," it would "recall the earlier mandate and amend it to provide for post-judgment interest from the date of the original judgment." (*Id.* at 3a, 16a-17a.)

REASONS FOR DENYING THE PETITION

ACLA devotes its third petition to re-raising yet again the very same questions that this Court twice has properly declined to review. Indeed, although the three questions presented and the arguments that follow have now been rearranged somewhat, ACLA's current petition is almost entirely a word-for-word, cut-and-paste copy of its 2006 petition. But nothing has changed since 2006—or, for that matter, since ACLA's first petition in 2003—to make ACLA's factbound disagreements over the court of appeals' application of

settled law any more certworthy this third time around. *See* S. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ where question turned on review of factual findings).

Since the Court denied ACLA's last petition, the only new developments in this case have been the district court's and the Ninth Circuit's rulings regarding the date when post-judgment interest on the remitted punitive-damages awards should begin to run. ACLA does not challenge these rulings before this Court. And the issues that ACLA does address have been thoroughly briefed on the prior petitions by the parties, petitioners' *amici*, and the U.S. Solicitor General. There is, once again, no basis here for this Court's review. ACLA's third petition for certiorari, accordingly, should be denied.

I. PETITIONERS' FIRST AMENDMENT ARGUMENTS PRESENT NO LEGAL ISSUE FOR SUPREME COURT REVIEW

A. ACLA's Continual Disagreement with the Application of Settled Law to the Particular Facts of the Case Is Not a Basis for this Court's Review

It is well-settled that "true threats" of violence are not protected by the First Amendment. *Virginia* v. *Black*, 538 U.S. 343, 359 (2003); *Watts* v. *United States*, 394 U.S. 705, 707 (1969); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994). (*See* Pet. App. 99a, 115a, 118a, 154a-155a, 157a, 243a.) ACLA does not—and cannot—argue otherwise. Instead, ACLA contends that its statements could not be true threats because they consisted of "public forum political speech" and, thus, under *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), required some sort of heightened, "extreme care" standard of review that allegedly was not satisfied in this case. (Pet. 13-14.) This is just wrong. The court of appeals' *de novo*, independent review of the facts of this case took into account all contextual factors, as this Court's precedents require, and ACLA's disagreement, once again, simply concerns the result of that application of settled law to the facts of this particular case.

The *en banc* Ninth Circuit carefully considered both the political aspect and the public distribution of petitioners' statements. (Pet. App. 127a-129a; *see* Resp. App. 50a-51a.) Upon *de novo* review of the factual record, the *en banc* court determined, as had the jury and district court judge, that a reasonable speaker in ACLA's position would reasonably foresee—indeed, could only believe—that respondents would perceive ACLA's statements as a serious expression of an intent to do them bodily harm. (Pet. App. 114a-115a, 146a-150a, 154a-155a.) ACLA's factbound disagreement with these finding is no basis for certiorari review. *See* S. Ct. R. 10.

ACLA's argument that some different standard should apply to this case is without precedent. Indeed, many threats cases—including those involving threats against the President and other federal officers—involve public, political speech, and no different standard applies. As the *en banc* Ninth Circuit held, and the Solicitor General noted in opposing ACLA's first certiorari petition, the same standard—an objective, reasonable person test, in which "the whole factual context" is considered[9]—controls the threats

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[9] ACLA contends that, after *Black*, the test for true threats requires subjective intent to threaten. (Pet. 15, 17-18.) As discussed below, ACLA not only misinterprets *Black*, but ignores that, as the Ninth Circuit found and the Solicitor General agreed, any subjective-intent requirement was met in

determination irrespective of the speaker's particular political views or method of communication. (Pet. App. 132a-140a; Resp. App. 40a-42a); *see, e.g.*, *Madsen*, 512 U.S. at 773 (stating, in a case involving abortion protesters, that "threats . . . however communicated, are proscribable under the First Amendment").

At bottom, ACLA's argument boils down, once again, to a claim that the *en banc* decision in this case conflicts with this Court's 1982 decision in *Claiborne Hardware*. (Pet. 12-14, 17, 20-21.) But, as the Solicitor General emphasized in opposing ACLA's first petition, this is simply not so. (Resp. App. 49a ("Nor are petitioners correct in claiming that that the court of appeals' decision conflicts with *Claiborne Hardware*.").) The *en banc* court fully and carefully analyzed the facts of *Claiborne Hardware* against the very different facts of this case, and ACLA's disagreement with the result

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this case. *See infra* pp. 21-25; *see also, e.g.*, *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint that this Court will not reach constitutional questions in advance of the necessity of deciding them."); *Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (noting "series of rules" the Court has developed "for its own governance . . . under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision").

of that application presents no question for certiorari review. (Pet. App. 119a-122a.)

Unlike this case, *Claiborne Hardware* did not even involve a true threats analysis under a threats statute. As the court of appeals here explained, although some of the statements by Charles Evers at issue in *Claiborne Hardware* (including "the break your neck" comments referred to in the petition) could have been understood as threats in other contexts, "there was no context [under the facts of *Claiborne Hardware*] to give" the statements "the implication of authorizing or directly threatening unlawful conduct." (Pet. App. 122a.) Unlike this case, Evers's statements were "extemporaneous, surrounded by statements supporting non-violent action," did not target specific individuals, and were not similar to statements that preceded violence in the past. (*Id.*) "Nor is there any indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." (*Id.*) As the Solicitor General stated, "[a]ll of those considerations distinguish *Claiborne Hardware* from this case." (Resp. App. 50a.)

Indeed, unlike the targets of Evers's speech—the boycott-breakers who were *not* the plaintiffs in *Claiborne Hardware*—Physicians here testified about their personal fear following ACLA's threats (and fear of petitioners in particular) and described the extensive

security measures they undertook as a direct result. (Pet. App. 84a, 102a-105a, 325a.) The prior posters and murders and petitioners' repeated endorsement of that violence provided further relevant context for the finding of intent to threaten violence that the *Claiborne Hardware* facts lacked. (*Id.* at 119a-122a, 146a-150a.) There simply is no conflict here with the law enunciated in *Claiborne Hardware*—the facts and legal bases of the decisions are just different.

Thus, petitioners' *Claiborne Hardware* argument once again provides no basis for review.

B. Petitioners' Proposed Subjective-Intent Requirement for "True Threats" Presents No Issue for Review Because Subjective Intent Was Found in This Case

ACLA, for the third time, asks this Court to grant review to change First Amendment law to require subjective intent for "true threats"—a standard that was, in any event, met in this case.[10] Because the jury

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[10] ACLA's petition makes clear that its proposed subjective intent requirement would derive not from any statute but rather from the First Amendment. (Pet. 14-15.) Thus, even were the constitutional question appropriate for review, adoption of a subjective intent standard in this case would make subjective

instruction in this case required subjective intent for the statutory violation, there simply is no need in this case even to address the First Amendment question. *See, e.g.*, *Slack* v. *McDaniel*, 529 U.S. 473, 485 (2000) (noting that "the 'Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of'" (quoting *Ashwander*, 297 U.S. at 347)).[11]

In any event, just as it did on its two prior petitions, ACLA bases its request for review on a

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intent the constitutional intent requirement for all threats statutes. *See* supra note 9.

[11] ACLA's argument that the Court should adopt a subjective intent requirement for true threats also was not properly preserved below. Petitioners supposedly "preserved for appeal" a specific intent argument by including a specific intent jury charge in a mass of proposed jury instructions that contained contradictory instructions on the standard of intent. But petitioners *never* argued that the trial court should give the instruction. Instead, at the final charge conference, petitioners' lead counsel stated with respect to the "true threats" instruction: "Yes, I never said—I never said the test should be changed. . . . I am not arguing, your Honor, that the test should be changed." (1/25/99 Tr. 3123.) Simply submitting a proposed instruction stating it is "preserved for appeal" is insufficient under well-settled rules of preservation. Fed. R. Civ. P. 51; *see, e.g.*, *Monroe* v. *City of Phoenix*, 248 F.3d 851, 858-59 (9th Cir. 2001), *overruled on other grounds by Acosta* v. *Hill*, 504 F.3d 1323 (9th Cir. 2007).

misreading of this Court's decision in *Black*. In *Black*, this Court held that Virginia's ban on cross burning did not violate the First Amendment. 538 U.S. at 347-48. The *Black* Court reaffirmed that "true threats" are unprotected and explained that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. As it did in both its second petition and in a supplemental brief filed on its first petition, ACLA points to this language as somehow imposing a subjective-intent requirement for threats as a matter of First Amendment law. (Pet. 15, 17-18.) As the Solicitor General noted, however, the *Black* Court "was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both)." (Resp. App. 47a n.6.)

In any event, and significantly, the jury in this case found specific intent. (Pet. App. 126a-127a.) Thus, as the Solicitor General stated, "[t]his case is not a suitable vehicle to address . . . whether . . . the definition of a true threat should include a subjective as well as an objective component." (Resp. App. 40a.) As Judge Rymer's opinion for the *en banc* court explains, the jury instructions for the statutory elements of FACE required a finding of intent to intimidate (with intimidation specifically defined to mean by threats of bodily injury) and thus satisfied any subjective-intent standard. (Pet. App. 127a (noting that a subjective-

intent standard "is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate").)[12]

Thus, this Court should not review ACLA's subjective-intent question because it simply would have no impact on this case. *See, e.g. United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (noting that "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case" (quoting *Ashwander*, 297 U.S. at 347) (internal quotation marks omitted)); (Resp. App. 40a ("The court of appeals' refusal to incorporate into its true threats standard a requirement that the

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[12] Using the exact same language as in its prior petition, ACLA contends that the "intent to intimidate" found by the jury may have been only a "generalized" intent to intimidate and not a "specific intent to *threaten* violence to be *committed by the speaker*," which it claims is required by *Black*. (Pet. 17-18.) This is not so, as intimidation is explicitly defined in FACE (and in the jury instructions) to be limited to threats of *bodily* harm. 18 U.S.C. § 248; (*see* Resp. App. 48a ("An intent to intimidate—defined by the district court as 'to place a person in reasonable apprehension of bodily harm'—is virtually identical to an intent to threaten." (citation omitted))); *see also New York ex rel. Spitzer* v. *Cain*, 418 F. Supp. 2d 457, 460, 479-80 (S.D.N.Y. 2006) (holding that this very subjective-intent argument, which was raised there by one of same attorneys representing ACLA in this case, was "ultimately irrelevant" given the requirements of the FACE statute).

speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a person, and the jury was instructed in accordance with that requirement.")).

C. ACLA Was Not Held Liable for "Generating Fear" of Third-Party Violence—It Was Held Liable for Its Own True Threats of Violence

ACLA also appears to argue—as it did on its previous two petitions—that the *en banc* Ninth Circuit's decision conflicts with *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). (Pet. 19-22.) This is clearly not so.

This is not an incitement case governed by *Brandenburg*. Rather, ACLA was held liable not for inciting acts by others or for "generating fear" of third-party violence, but for its own true threats of violence. As the Solicitor General emphasized: "*Brandenburg* was not . . . a threats case. This Court has never suggested that true threats should be subject to *Brandenburg*'s imminence requirement; to the contrary, the Court has characterized true threats and incitement as separate categories of proscribable expression." (Resp. App. 49a (citing *Black*, 538 U.S. at 359).) Indeed, recognizing this very distinction, ACLA

urged the district court to instruct the jury on the difference between threats and incitement—and received the precise instruction it requested. (Resp. App. 53a-54a; Pet. App. 195a.)

To the extent ACLA is arguing what Judge Kozinski argued in his *en banc* dissent—*i.e.*, that the evidence does not establish that petitioners' threats conveyed the message that petitioners themselves would inflict bodily harm on Physicians (Pet. App. 156a-157a)—that argument also provides no basis for this Court's review. Judge Kozinski's dissent took issue not with the *en banc* majority's articulation of the applicable legal standard, but with its application of that standard to the particular facts of this case. (*Id.* at 156a-159a.) Indeed, upon independent review of the factual record, the *en banc* majority, like the jury, found that Judge Kozinski's proposed standard was met—and that the evidence demonstrated that petitioners, not third parties, would be the source of the threatened harm on Physicians. (*E.g.*, *id.* at 99a ("the jury must have found that ACLA made statements to intimidate the [P]hysicians, reasonably foreseeing that [P]hysicians would interpret the statements as a serious expression of *ACLA's* intent to harm them" (emphasis added).)[13] The dissenting Ninth Circuit

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[13] The evidence was substantial on this issue. ACLA issued its posters with knowledge of the preceding posters and murders,

judges—and ACLA, to the degree it here makes this same argument—simply take a different view as to what the evidence in this case shows. (*Id.* at 156a.) Like every other question presented by ACLA's third petition as before, this sort of factbound disagreement over the evidence does not warrant certiorari review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review"); (*see also* Resp. App. 42a-43a & n.3).

II. PETITIONERS' STANDING, FACE CONSPIRACY, AND RICO ARGUMENTS PRESENT NO PRESERVED LEGAL ISSUE FOR SUPREME COURT REVIEW

A. Petitioners Have Failed To Preserve Their Standing Argument

Once again, ACLA seeks review of its argument that the respondent health clinics (Planned Parenthood

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and Physicians "could well believe that *ACLA* would make good on the threat." (Pet. App. 147a-149a (emphasis added).) Physicians also testified that they feared *these* defendants. Dr. Hern, for example, testified that ACLA's hit lists said "do what we tell you to do, or *we will kill you*. And they do." "I am fearful for my life, that I am afraid that—*that someone from the group that put out this poster* would be there and would kill me." (Tr. 639, 664; Pet. App. 105a (emphases added).)

of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center) lacked standing to sue. ACLA admits that it did not raise this argument on its first Ninth Circuit appeal. (Pet. 10-11.) Moreover, the jury rejected the argument *on the facts* at trial when it awarded the clinics distinct damages pursuant to instructions that ACLA never challenged. (Pet. App. 483a-499a; *see also id.* at 373a-374a.) As the district court and the Ninth Circuit have repeatedly held in the years since, the argument—which involves application of facts to a statutory standard—plainly is barred. (Pet. App. 51a-53a, 67a-68a; Resp. App. 1a-2a, 23a-24a.)

Contrary to ACLA's contention, its standing argument is not a nonwaivable issue of subject-matter jurisdiction. (*See* Pet. 10.) Rather, the standing argument presented by ACLA requires an analysis into the respondent clinics' underlying factual claims of liability under FACE and RICO—which makes ACLA's argument one of statutory, not constitutional, standing. (Pet. App. 373a-374a); *see also Lerner* v. *Fleet Bank, N.A.*, 318 F.3d 113, 129 (2d Cir. 2003) ("[i]n evaluating whether a plaintiff has standing under RICO, the court must . . . 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them'" and that because such an examination is "sufficiently intertwined with the merits of the RICO claim," "RICO standing is not a jurisdictional issue"

(quoting *Associated Gen. Contractors* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983))).[14]

At bottom, ACLA's only disagreement here is with the jury's application of the evidence in this case to the statutory standards of FACE and RICO under which the jury was instructed. (*See* Pet. App. 472a-473a ("To find for a particular plaintiff on the FACE claim, you must find . . . that the plaintiff was aggrieved or harmed by that threat."); Resp. App. 55a-57a (instructing jury that it must find that defendant's violation specifically caused the plaintiff's injury to award that plaintiff any damages under FACE or RICO); *see also* Pet. App. 373a-374a (rejecting defendants' standing arguments when "at trial each plaintiff will be required to prove that a reasonable person in that plaintiff's position would have felt threatened by the defendants' statements in the context in which the statements were made" and "each plaintiff must prove pecuniary loss"). Once again, ACLA's continuing factbound dispute with the jury's verdict is no basis for certiorari review. S. Ct. R. 10.

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[14] In any event, even if ACLA's standing argument implicated Article III (and it does not), it would still be precluded now. (Pet. App. 51a-53a, 67a-68a; Resp. App. 1a-2a, 23a-24a); *see also Ferreira* v. *Borja*, 93 F.3d 671, 674 (9th Cir. 1996) (law of the case applies to jurisdictional rulings).

B. Petitioners Have Failed To Preserve Their Face Conspiracy Argument

Just as it did on its two prior petitions, ACLA also argues that it is entitled to a new trial on Physicians' FACE claim because the jury was allowed to consider a "non-existent" claim for conspiracy to violate FACE. (Pet. 12.) This, too, is not a preserved claim appropriate for this Court's review. Not only did ACLA fail *ever* to raise this argument in the district court, on the contrary ACLA's own proposed jury instructions and jury verdict form specifically included a FACE conspiracy claim. (Resp. App. 62a-93a, 97a-99a, 105a-108a.) The *en banc* court thus properly rejected the argument on preservation grounds. (Pet. App. 138a n.16 ("declin[ing] to consider the issue because it is raised for the first time on appeal" and noting that "[ACLA] had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy)").)

Contrary to petitioners' assertion, the question whether civil conspiracy claims are permissible under FACE is one that goes to whether Physicians have stated a claim—it does not involve the Court's subject matter jurisdiction. *See, e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 n.10 (2006) (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)). Moreover, as the *en banc* Ninth

Circuit noted, "FACE came into being in part because of 'organized,' 'concerted' campaigns by 'groups' to disrupt access to reproductive health services . . . ." (Pet. App. 138a n.16 (quoting S. Rep. No. 103-117, at 6-7).) Thus, despite ACLA's argument that "plain error" has taken place here, the court of appeals correctly found to the contrary. (*Id.*)

Thus, this repeated argument, too, is not a basis on which this Court should grant review.

C. Petitioners Have Failed To Preserve Their RICO Argument

Finally, as it argued in its last petition, ACLA contends that the court of appeals erred in not reconsidering the RICO liability judgment in light of this Court's decision in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), which was decided between ACLA's first and second appeals to the Ninth Circuit and before this Court denied ACLA's first certiorari petition in 2003. Like the standing argument just discussed, this very argument was made on ACLA's first petition by one of its *amici* and on the second petition by ACLA itself. This Court properly declined review on those two prior occasions; it should do the same now.

As Physicians explained in opposing ACLA's last certiorari petition, although petitioners raised several

RICO and Hobbs-Act arguments in their motions for summary judgment, at trial, in Rule 50 motions at the close of the evidence, and on their first Ninth Circuit appeal, petitioners—despite their knowledge of the ongoing proceedings in *Scheidler*—*never* raised the argument that they had not "obtained" Physicians' property for purposes of Hobbs-Act extortion after the district court rejected this argument at the motion-to-dismiss stage. (*See* Pet. App. 428a-430a.) The jury in this case was instructed on the RICO claim without *any* argument by petitioners as to the "obtaining" element of the Hobbs Act. (*See* Resp. App. 100a, 109a.) It was not until the punitive-damages remand in 2003—*seven years after* the district court's decision on the motion to dismiss and *ten years after* this Court first noted this Hobbs-Act "obtaining" argument at oral argument in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"), *see* Transcript of Oral Argument, 1993 WL 757635, at *13-16, 21-24, 27-28, 36 (Dec. 8, 1993), that petitioners sought yet another bite at the apple. When ACLA sought to raise this Hobbs-Act argument on its *second* appeal to the Ninth Circuit, the panel properly held that any challenge to the final RICO liability judgment was precluded. (Pet. App. 51a-53a.)

ACLA's suggestion—also made in its second petition—that it could not waive the "obtaining" argument because *Scheidler II* was not decided until after the trial and first appeal in this case is meritless.

As the Court stated in *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950):

> Petitioner cannot be relieved of [his] choice [not to appeal from a court holding on a specific issue] because hindsight seems to indicate to him that [this] decision . . . was probably wrong, considering the outcome of the [intervening] *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

See also United States v. *Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002); *Clifton* v. *Attorney Gen. of Cal.*, 997 F.2d 660, 664 n.5 (9th Cir. 1993) (noting that even if a supervening Supreme Court decision has authoritatively changed the law on a specific issue, relief should not be permitted where, as here, "a party has made a deliberate choice not to pursue an appeal" from a determination of the trial court on that issue); *Title* v. *United States*, 263 F.2d 28, 31 (9th Cir. 1959) (same).

As a result, ACLA failed to preserve this RICO argument, and it therefore is both barred and not appropriate for this Court's review. (Pet. App. 31-34); *see In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (mandate rule); *Kesselring* v. *F/T Arctic Hero*, 95

F.3d 23, 24-25 (9th Cir. 1996) (issues not raised on first appeal are waived); *Hylton*, 294 F.3d at 135 (D.C. Cir. 2002) ("A legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time" (quoting *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)) (internal quotation marks omitted).).[15]

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[15] Without including a claim in its Questions Presented, ACLA asserts—as it did in its second petition—that the punitive-damages award in this case "makes a mockery" of this Court's decision in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). (Pet. 22.) Petitioners' failure to include a punitive-damages argument in their Questions Presented alone is enough to defeat certiorari review. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 202-03 (2002) (holding that a question not presented in the petition was "not properly before" the Court). In any event, the court of appeals held on ACLA's second appeal that, under this Court's case law including *State Farm*, a 9 to 1 ratio of punitive to compensatory damages was the appropriate balance in this case—and dramatically remitted the awards, *in petitioners' favor*, by $103.8 million, to approximately $4.7 million. (Pet. App. 46a-50a.) ACLA's wish that the FACE award had been reduced to zero is no basis for certiorari review. S. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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